Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Mohd Sobri bin Che Hassan

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-29–05 OF 2018(P)
AHMAD MAAROP PCA, ZAHARAH IBRAHIM CJ (MALAYA), AZAHAR MOHAMED, ALIZATUL KHAIR AND ROHANA YUSUF FCJJ
21 OCTOBER 2019

Employment — Contract of service — Local government employee — Contract of service with local authority was subject to provisions of Local Government Act 1976, General Orders and Disciplinary Regulations — Procedure for dismissal of employee was regulated by statute affording employee right to be heard — Whether nature of relationship between employee and local authority was more than just master and servant and was governed by public law and amenable to public law remedies — Whether certiorari would issue to quash dismissal of such employee if dismissal proceedings were tainted with procedural improprieties and breach of rules of natural justice — Whether in that respect local government employee was no different from holder of 'public office' under art 132 of Federal Constitution

The respondent was employed by the second appellant ('A2') as an engineer pursuant to a contract of service which incorporated and adopted the General Orders and the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 ('the Regulations'). A2 was established under the Local Government Act 1976 ('the LGA') while the first appellant ('A1') was A2's disciplinary body. From the start, the respondent's employment life with A2 had been tumultuous. He was unhappy over being transferred from the engineering department to the health services department ('the transfer') and his attempt to challenge the same by way of a civil suit ended in failure. Thereafter, he was found guilty and punished for coming late to work, and, again, his attempt to challenge that action by the appellants in court failed. Finally, he was dismissed from service after being found guilty of breaching the Regulations by allegedly seeking the help of a state assemblyman to resolve the problem about the transfer. The respondent had denied the charge for which he was dismissed and, apart from making written representations in his defence, he had requested for an inquiry panel to be formed to investigate the charge but that was never done. Contending that he was not accorded an opportunity to be heard, that the rules of natural justice were not complied with and that the disciplinary proceedings to dismiss him were tainted with procedural improprieties, the respondent applied by way of a judicial review ('JR') application to quash the decision to dismiss him. In resisting the application, the appellants had argued that the quashing of the dismissal decision was

A tantamount to granting the respondent specific performance of his contract of service or reinstating him to his former position, neither of which reliefs were available to the respondent because: (a) both at common law and under s 20(1)(b) of the Specific Relief Act 1950, a contract for personal service could not be enforced by an order of specific performance; (b) the respondent was B neither a claimant seeking reinstatement before the Industrial Court under s 20(1) of the Industrial Relations Act 1967 on the ground that he was unfairly dismissed, nor was he the holder of a public office under art 132 of the Federal Constitution ('FC') to be entitled under art 135 of the FC to be given a reasonable opportunity of being heard before being dismissed or reduced in C rank. The appellants submitted that the Federal Court in *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 ('Jempol') held that employees of local authorities were not holders of public office under art 132 of the FC and as they were generally employed purely on a contractual basis they could not claim for reinstatement or D declaratory relief which had the effect of granting specific performance of their contract of service. The respondent, on the other hand, argued that as his employment contract had a 'public law' element to it, since it was subject to s 16(4) of the LGA, the Regulations and the General Orders, he was entitled to an order of certiorari if he was dismissed in breach of the rules of natural justice E or if he had been denied of an opportunity to be heard. The High Court held that the respondent's dismissal was valid and dismissed the JR application. The Court of Appeal ('COA') allowed the respondent's appeal, set aside the High Court's decision, granted certiorari to quash A1's decision to dismiss the respondent and awarded him damages as assessed by a deputy registrar. The F High Court, in dismissing the JR application, had opined that even if the respondent had established that his dismissal had breached his contract of service, he would only have obtained damages and not a declaration that his dismissal was void (as that would, in effect, amount to a reinstatement) or an order that he be reinstated to his job. In reversing the High Court's decision, G the COA held that: (i) s 16(4) of the LGA conferred on employees of local governments the right to a reasonable opportunity of being heard prior to dismissal or reduction in rank, much like what was provided in art 135(2) of the FC; (ii) since any disciplinary action by the appellants against the respondent involved compliance with s 16(4) of the LGA and other statutory H procedures, the dispute between the respondent and the appellants was a public law matter which entitled the respondent to seek any of the public law remedies, including an order of certiorari; and (iii) the respondent's dismissal process was tainted with procedural impropriety and the rules of natural justice had been breached. The Federal Court granted the appellants leave to appeal I against the COA's decision solely on the question whether the reliefs of specific performance or reinstatement was available to the respondent.

Held, unanimously dismissing the appeal and affirming the COA's decision but directing that: (a) the quashing of A1's decision to dismiss the respondent

shall only render the respondent employed by A2 from the date he was unlawfully dismissed on 28 November 2013 up till the date of delivery of the instant judgment; and (b) the assessment of damages be heard before a High Court judge instead of by the deputy registrar:

(1) The COA correctly found that the appellants' dismissal of the respondent was tainted with procedural impropriety and that the relationship between the respondent and A2 was not simply one of master and servant but one that was governed by statute, and thus by public law, and was therefore amenable to the whole range of public law remedies available (see paras 45–46 & 104).

(2) Cases, such as the instant one, where the dismissal was regulated by statute affording the employee a right to be heard, elevated the status of the parties beyond a pure master and servant relationship. There was therefore no question of specific performance and a fortiori, it could not be taken to mean 'reinstatement'. On the facts of the case, an effective 'reinstatement' was not warranted because the parties had been in constant litigation and as part of the issues surrounding his unlawful dismissal, the respondent had claimed that certain members of A1 were 'biased' or in a position of 'conflict of interest' when they decided to dismiss him (see paras 109 & 116).

(3) A case of dismissal involving public employees, especially where the procedure for dismissal was regulated by statute, was governed by public law and therefore amenable to public law remedies. This was unlike the case with ordinary employment contracts which fell within the scope of contract and labour laws (see para 99).

(4) There was no practical distinction between those in the employ of the public services in art 132 of the Federal Constitution and those employed in statutory authorities where there was an express guarantee of the right to be heard protected by statute — much like the one guaranteed to the respondent in s 16(4) of the LGA (see para 100).

(5) When the Federal Court in *Jempol* said that there were two exceptions to the rule against reinstatement as far as specific performance was concerned, that did not reflect the position in law. This was because even in the case of a local government employee such as the respondent, s 16(4) of the LGA expressly provided for the right to be heard and a contravention of that right potentially rendered the termination void. In *Jempol*, the Federal Court was not referred to s 16(4) of the LGA and, as a consequence, the relief of certiorari was not even conceptually available to the employee. There was a misapprehension of the concept of 'reinstatement' as far as a pure master and servant relationship was concerned, on the one side, and employment the terms of which were governed by statute, on the other (see para 101).

(6) The lack of availability of specific performance as a remedy related primarily to the common law relationship of master and servant which only provided for termination simpliciter. The only remedy available under such termination was damages, and any form of relief which was equivalent to specific performance was precluded — whether framed in the form of a declaration or as 'reinstatement' (see para 102).

[Bahasa Malaysia summary

Responden telah diambil bekerja oleh perayu kedua ('A2') sebagai jurutera menurut kontrak perkhidmatan yang menggabungkan dan menerima pakai Perintah Am dan Peraturan Pegawai Awam (Kelakuan dan Tatatertib) Majlis Perbandaran Seberang Perai 1995 ('Peraturan'). A2 ditubuhkan di bawah Akta Kerajaan Tempatan 1976 ('AKT') manakala perayu pertama ('A1') adalah badan tatatertib A2. Dari awal, kehidupan pekerjaan responden dengan A2 telah bergolak. Dia tidak gembira dipindahkan dari jabatan kejuruteraan ke jabatan perkhidmatan kesihatan ('pemindahan') dan percubaannya untuk mencabar perkara yang sama dengan tuntutan saman berakhir dengan kegagalan. Setelah itu, dia didapati bersalah dan dihukum kerana datang terlambat bekerja, dan, sekali lagi, percubaannya untuk mencabar tindakan oleh perayu di mahkamah telah gagal. Akhirnya, dia diberhentikan dari perkhidmatan setelah didapati bersalah melanggar Peraturan kerana dikatakan telah memohon bantuan ADUN untuk menyelesaikan masalah tentang pemindahan tersebut. Responden telah menolak pertuduhan yang menyebabkan dia diberhentikan dan, selain membuat representasi bertulis untuk membela diri, dia telah memohon agar panel siasatan dibentuk untuk menyiasat pertuduhan itu tetapi itu tidak pernah dilakukan. Berpandangan bahawa dia tidak diberi peluang untuk didengar, bahawa rukun keadilan asasi tidak dipatuhi dan bahawa prosiding tatatertib untuk memecatnya dicemari dengan penyelewengan prosedur, responden memohon melalui semakan kehakiman ('SK') suatu permohonan untuk membatalkan keputusan untuk memecatnnya. Dalam menolak permohonan itu, perayu-perayu berpendapat bahawa pembatalan keputusan pemecatan itu sama dengan memberikan pelaksanaan spesifik kepada responden dalam kontrak perkhidmatannya atau mengembalikannya ke jawatan asalnya, dan tiada relief yang tersedia bagi responden kerana: (a) baik berdasarkan undang-undang awam mahu pun di bawah s 20(1)(b) Akta Pelaksanaan Spesifik 1950, kontrak untuk perkhidmatan peribadi tidak dapat dikuatkuasakan oleh perintah pelaksanaan spesifik; (b) responden bukan penuntut yang memohon pengembalian semula jawatan asal di hadapa Mahkamah Perusahaan di bawah s 20(1) Akta Perhubungan Perusahaan 1967 dengan alasan bahawa dia dipecat secara tidak adil, dan juga dia bukan pemegang jawatan awam di bawah perkara 132 Perlembagaan Persekutuan ('PP') untuk diberi hak di bawah perkara 135 PP agar diberikan peluang yang wajar untuk didengar sebelum dipecat atau diturunkan pangkat. Perayu berhujah bahawa Mahkamah Persekutuan dalam kes *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan*

& Anor [1997] 2 MLJ 361 ('Jempol') berpendapat bahawa pekerja pihak berkuasa tempatan bukan pemegang jawatan awam di bawah perkara 132 PP dan kerana mereka biasanya diambil bekerja semata-mata berdasarkan kontrak, mereka tidak dapat menuntut pengembalian semula jawatan asal atau relief deklarasi yang mempunyai kesan kepada pelaksanaan spesifik kontrak perkhidmatan mereka. Sebaliknya, responden berpendapat bahawa kerana kontrak pekerjaannya mempunyai elemen 'undang-undang awam', memandangkan ia tertakluk kepada s 16(4) PP, Peraturan dan Perintah Am, dia berhak mendapat perintah certiorari jika dia dipecat melanggar rukun peraturan keadilan asasi atau jika dia dinafikan peluang untuk didengar. Mahkamah Tinggi berpendapat bahawa pemecatan responden adalah sah dan menolak permohonan SK itu. Mahkamah Rayuan ('MR') membenarkan rayuan responden, mengetepikan keputusan Mahkamah Tinggi, memberikan certiorari untuk membatalkan keputusan A1 untuk memecat responden dan memberinya award ganti rugi sebagaimana yang ditaksir oleh timbalan pendaftar. Mahkamah Tinggi, dalam menolak permohonan SK itu, telah berpendapat bahawa walaupun responden telah membuktikan bahawa pemecatannya telah melanggar kontrak perkhidmatannya, dia hanya akan mendapat ganti rugi dan bukan deklarasi bahawa pemecatannya adalah tidak sah (seperti yang terjadi, dari kesannya, adalah pengembalian semula jawatan asal) atau perintah agar dia dimasukkan semula ke pekerjaannya. Dalam mengakas keputusan Mahkamah Tinggi, MR berpendapat bahawa: (i) s 16(4) AKT memberikan hak kepada pegawai kerajaan tempatan untuk mendapat peluang yang wajar untuk didengar sebelum pemecatan atau penurunan pangkat, seperti yang diberikan dalam perkara 135(2) PP; (ii) oleh kerana setiap tindakan tatatertib oleh perayu terhadap responden melibatkan pematuhan s 16(4) AKT dan prosedur statutori lain, pertikaian antara responden dan perayu-perayu adalah undang-undang awam yang memberi hak kepada responden untuk memohon salah satu remedi undang-undang awam, termasuk perintah certiorari; dan (iii) proses pemecatan responden dicemari dengan ketidaktentuan prosedur dan rukun keadilan asasi yang telah dilanggari. Mahkamah Persekutuan memberi perayu-perayu kebenaran untuk merayu terhadap keputusan MR semata-mata berhubung persoalan sama ada relief-relief pelaksanaan spesifik atau pengembalian semula jawatan adalah tersedia bagi responden.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan MR tetapi mengarahkan bahawa: (a) pembatalan keputusan A1 untuk memecat responden hanya akan menjadikan responden diambil bekerja oleh A2 dari tarikh dia dipecat secara tidak sah pada 28 November 2013 sehingga tarikh penyampaian penghakiman ini; dan (b) taksiran ganti rugi didengar di hadapan hakim Mahkamah Tinggi dan bukannya oleh timbalan pendaftar:

(1) MR dengan wajar mendapati pemecatan responden oleh perayu-perayu telah dicemari dengan ketidakaturan prosedur dan bahawa hubungan

A antara responden dan A2 bukan hanya setakat majikan dan pekerja tetapi yang dikawal oleh statut, dan dengan itu oleh undang-undang awam, dan oleh demikian setuju dengan pelbagai kaedah penyelesaian undang-undang awam yang ada (liht perenggan 45–46 & 104).

B (2) Dalam kes seperti ini, di mana pemecatan dikawalselia oleh statut yang memberikan pekerja hak untuk didengar, menaikkan status pihak-pihak melebihi hubungan majikan dan pekerja semata-mata. Oleh itu tiada persoalan berhubung pelaksanaan spesifik dan a fortiori, ia tidak boleh dianggap untuk bermaksud 'reinstatement'. Berdasarkan fakta kes,
C keberkesanan 'reinstatement' tidak wajar kerana pihak-pihak sentiasa dalam litigasi dan sebagai sebahagian daripada isu-isu yang berkisar pemecatan tidak sahnya, responden telah mendakwa bahawa beberapa anggota tertentu A1 adalah 'biased' atau dalam kedudukan 'conflict of interest' apabila mereka membuat keputusan untuk memecatnya (lihat
D perenggan 109 & 116)

(3) Kes pemecatan yang melibatkan pekerja, terutamanya di mana prosedur untuk pemecatan adalah dikawal oleh statut, adalah dikawal oleh undang-undang awam dan dengan itu selaras dengan remedy
E undang-undang awam. Ini tidak seperti yang berlaku dalam kes berkaitan kontrak pekerjaan biasa yang terangkum dalam skop kontrak dan undang-undang buruh (lihat perenggan 99).

(4) Tiada perbezaan praktikal antara mereka yang diambil bekerja dalam perkhidmatan awam dalam perkara 132 Perlembagaan Persekutuan dan
F mereka yang diambil bekerja dengan pihak berkuasa statutori di mana terdapat jaminan yang nyata berhubung hak untuk didengar yang dilindungi oleh statut — sama sepertimana yang dijaminkan kepada responden dalam s 16(4) AKT (lihat perenggan 100).

G (5) Apabila Mahkamah Persekutuan di *Jempol* mengatakan bahawa terdapat dua pengecualian kepada peraturan terhadap pengembalian semula jawatan asal setakat mana pelaksanaan spesifik adalah berkenaan, itu tidak menggambarkan kedudukan dalam undang-undang. Ini adalah kerana walau pun dalam kes pekerja kerajaan tempatan seperti
H responden, s 16(4) AKT dengan jelas memperuntukkan hak untuk didengar dan pelanggaran hak tersebut berpotensi menyebabkan penamatan tidak sah. Di *Jempol*, Mahkamah Persekutuan tidak dirujuk kepada s 16(4) AKT dan, akibatnya, relief certiorari bahkan tidak tersedia secara konseptual kepada pekerja. Terdapat pemahaman yang
I salah tentang konsep 'reinstatement' setakat mana hubungan majikan dan pekerja adalah berkenaan, di satu pihak, dan pekerjaan yang mana terma-terma yang dikawal oleh statut, di satu pihak lain (lihat perenggan 101).

(6) Ketidaksediaan pelaksanaan spesifik sebagai remedi yang berkaitan

terutamanya dengan hubungan undang-undang am antara majikan dan pekerja yang hanya disediakan untuk pemudah cara penamatan. Satu-satunya remedi yang ada di bawah penamatan tersebut adalah ganti rugi, dan apa-apa bentuk relief yang setara dengan pelaksanaan spesifik adalah dilarang — sama ada dibuat dalam bentuk deklarasi atau sebagai 'reinstatement' (lihat perenggan 102).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (folld)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (folld)
Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha 1980 AIR 1896; [1980] 2 SCC 593, SC (refd)
Holiday Inn, Kuching v Lee Chai Siok Elizabeth [1992] 1 MLJ 230; [1992] 2 CLJ Rep 521, HC (refd)
Johnson v The Shrewsbury and Birmingham Railway Company (1853) 43 ER 358 (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)
Malloch v Aberdeen Corporation [1971] 2 All ER 1278, HL (folld)
Managing Director, Uttar Pradesh Warehousing Corporation and another v Vijay Narayan Vajpayee 1980 2 SCC 459, SC (folld)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (not folld)
Najar Singh v Government of Malaysia & Anor [1976] 1 MLJ 203; [1976] 1 LNS 81, PC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)
Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu [2010] 5 MLJ 295; [2010] 6 CLJ 1, CA (refd)
Quek Chek Yen v Majlis Daerah Kulai [1986] 2 MLJ 290, SC (distd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513, FC (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364, SC (folld)
Vidyodaya University of Ceylon and Others v Silva [1964] 3 All ER 865, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 78, 96, Schedule
Federal Constitution arts 132, 135(2)
Indian Constitution [IND] art 226

A Industrial Relation Act 1967 ss 2, 20, 20(1), 52, Part VI
Local Government Act 1976 s 16(4)
Majlis Public Officers Regulations (Conduct and Disciplinary Rules) 1995 regs 4(2)(), 27, 29, 29(4)
Public Service (Discipline and Conduct) Regulations 1993 reg 37(5)
B Rules of Court 2012 O 53
Rules of the High Court 1980 O 18 r 19(1)(a), (1)(b), (1)(d)
Specific Relief Act 1950 s 20(1)(b)
Tabung Angkatan Tentera Act 1973
Uttar Pradesh Act 58 of 1962 [IND] reg 16
C Uttar Pradesh State Warehousing Corporation Act 28 of 1956 [IND]

Dr Cyrus Das (Karin Lim Ai Ching and Murgan Maniam with him) (Presgrave & Matthews) for the appellant.
Vijaya Navaratnam (Vijaya Navaratnam) for the respondent.

D

Alizatul Khair FCJ (delivering judgment of the court):

INTRODUCTION

E **[1]** We heard parties' submissions earlier and reserved our judgment to another date. This judgment is delivered pursuant to s 78 of the Courts of Judicature Act 1964 ('the CJA') due to the retirement of Zaharah Ibrahim CJM (as Her Ladyship then was). This is the judgment of the remaining members of the panel.

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[2] This appeal stems from an application for judicial review filed by the respondent against both the appellants to challenge his dismissal from the service of the second appellant. The High Court, after hearing the merits of the application, dismissed the same. On appeal, the Court of Appeal reversed the G High Court's decision and granted the respondent the reliefs he prayed for in prayers (1), (4) and (5) of his application. The appellants now appeal against part of the decision of the Court of Appeal.

H **[3]** In their notice of motion for leave to appeal to this court dated 8 November 2017, the appellants had formulated 11 leave questions. This court however, on 26 March 2018, granted leave to appeal only on the following question:

> Whether the principle in the Federal Court case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* which states:
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> I (a) The principle that the court will not order specific performance of a contract of service between master and servant, except where:
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> (i) a claimant/employee before an Industrial Court claiming for re-instatement on ground of dismissal without just cause and excuse under

section 20 of the Industrial Relations Act 1967 ('IRA 1967'); and

(ii) holder of any public office as set out in art 132 of the Federal Constitution.

(b) Employees of local authorities, such as the appellant, in general, are employed purely on a contractual basis and they are not holders of public offices as they are not under any category under art 132 of the Federal Constitution.

(c) Therefore, the claim for re-instatement available to a permitted claimant in the Industrial Court or to a holder of public office as categorised under art 132 of the Federal Constitution is not available to employees of local authorities.

applies in all cases or whether there are exceptions to this general rule.

[4] Before proceeding to discuss the issues, it would be appropriate to state the facts.

BACKGROUND FACTS

The facts alleging breach of reg 4(2)(h) of the 1995 Regulations

[5] The second appellant is the local authority of Seberang Perai established under the Local Government Act 1976 ('the LGA 1976'). The first appellant is its disciplinary body. The respondent was at the material time employed by the second appellant as an engineer vide a contract of service which also incorporated and adopted the General Orders, Majlis Public Officers Regulations (Conduct and Disciplinary Rules) 1995 ('1995 Regulations'). On 2 December 2013, the chairman of the first appellant issued a letter of even date to the respondent informing him of his dismissal from the second appellant's employ ('dismissal letter'). The facts leading up to the dismissal letter are as follows.

[6] Sometime in July 2002, shortly after the respondent was confirmed in the scheme of service under the second appellant, he was transferred from the Engineering Department to the Health Services Department ('transfer'). The respondent was not satisfied by the transfer and accordingly filed a civil suit at the High Court in Malaya at Penang challenging it. He claimed that his transfer to a department where the work was not within the scope of his expertise was in breach of the contract of employment between him and the second appellant. However, the suit was dismissed on a preliminary objection that the respondent ought to have initiated that action by way of an application for judicial review and not by way of a writ action. The respondent appealed but the Court of Appeal agreed with the High Court, upheld the preliminary objection and accordingly dismissed the appeal.

[7] Subsequently, the appellants initiated disciplinary proceedings against the respondent on the grounds that he was turning up late for work. The first

A appellant found him guilty of misconduct and communicated to him this finding vide letter dated 26 February 2013 ('first misconduct'). The punishments of warning and deferment of his annual salary increments for a period of twelve months were imposed on him pursuant to the said finding. These punishments were also recorded in the respondent's record book of
B service.

[8] Dissatisfied with the appellants' finding of the first misconduct, the respondent on 12 June 2013 took out an application for judicial review with a view to have it quashed ('first JR application'). The High Court dismissed the
C first JR application and the respondent did not appeal that decision.

[9] Sometime thereafter, allegations sprung that the respondent had raised the matter of his transfer to the State Assemblyman for Penaga who in turn
D brought up the issue at the sitting of the Penang State Assembly on 5 September 2012. The respondent, however, denied ever having raised the issue with the state assemblyman.

[10] The second appellant's Director of Management Services informed the
E second appellant's Director of Health Services via a memorandum dated 29 April 2013 entitled 'Report of Misconduct' that the respondent had breached the disciplinary rules in purporting to apply external influence to achieve a personal aim. This was purportedly in breach of reg 4(2)(h) of the 1995 Regulations which reads as follows:
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> (2) Seorang pegawai tidak boleh —
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> ...
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> (h) membawa atau cuba membawa apa-apa bentuk pengaruh atau tekanan luar untuk menyokong atau memajukan tuntutan berhubungan dengan
G perkhidmatan awam, sama ada tuntutan itu adalah tuntutannya sendiri atau tuntutan anggota-anggota perkhidmatan awam lain ...

[11] On 25 March 2013, the second appellant's Director of Health Services
H informed the respondent of the report obtained from the Director of Management Services. The respondent was accordingly supplied with a copy of the 'Report of Misconduct' memorandum dated 29 April 2013. The respondent was required to respond to the 29 April 2013 memorandum effectively making it a show cause letter.
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[12] The respondent replied vide his own memorandum dated 17 June 2013. The respondent's Head of Department, dissatisfied with the response, requested a further explanation from the respondent. Vide another letter dated 13 August 2013 he submitted another memorandum as clarification.

[13] Subsequently, on 17 September 2013, a working paper ('working paper') was submitted to the first appellant's chairman alleging a breach of reg 4(2)(h) of the 1995 Regulations. The chairman was asked to consider whether the alleged breach of discipline warranted a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank pursuant to reg 27 of the 1995 Regulations. Two days later, the chairman determined that the alleged breach of discipline complained of was of a nature meriting a punishment of dismissal or reduction in rank in accordance with reg 29 of the 1995 Regulations.

[14] A day later on 20 September 2013, the first appellant's chairman considered all the available information to determine whether there was a prima facie case against the respondent. In his determination, there did exist a prima facie case. Accordingly, the first appellant issued the respondent a letter dated 4 October 2013 informing him that disciplinary action is to be taken against him for the purpose of dismissal or reduction in rank and presented an amended charge to the respondent whereby he was required to make a written representation containing grounds upon which he relied on to exculpate himself of the charges against him. The amended charge was levied under reg 4(2)(h) of the 1995 Regulation alleging that the respondent had raised the matter of his transfer to the State Assemblyman of Penaga who in turn raised it in the said State Legislative Assembly sitting.

[15] The respondent in his letter of representation dated 11 October 2013 refuted the charge against him. He provided an explanation along with supporting documentary evidence. In that letter he also requested that an inquiry panel be formed to investigate the charge against him. As can be gathered from the judgment of the High Court below, the gist of his response may be summarised below:

(a) the respondent denies the charge;

(b) the respondent never met YB Dato Azhar Ibrahim, the said state assemblyman;

(c) the respondent had, prior to the charge, fully explained the matter to his Director of Department vide a letter dated 13 August 2013 and even in that letter had requested that an inquiry panel be formed should his explanation be deemed insufficient;

(d) that he was fully aware of the said reg 4(2)(h) of the 1995 Regulations and that he had no need for the State Assemblyman's support because he had already initiated the suit at the High Court challenging his transfer;

(e) even a brief perusal of the Hansard would indicate that his name was wrongly stated as Muhammad Subri Hj Hassan when in actual fact his real name is Mohd Sobri Che Hassan. His job description had also been

wrongly stated as being Penolong Pengarah Bangunan when his actual job description was Penolong Pengarah Kejuruteraan; and

(f) the respondent had made a police report concerning the misquoting of his alleged meeting with the state assemblyman.

[16] Subsequent to the respondent's letter dated 11 October 2013, the respondent's Head of Department also wrote to the first appellant's chairman vide letter dated 18 October 2013. In the said letter, the head of department provided reasons as to why he thought the respondent's refutations were valid and why the decision of the first appellant to take disciplinary action with a view to dismissal or reduction in rank against the respondent was not in the circumstances appropriate.

[17] The first appellant however issued a letter dated 2 December 2013 to the respondent informing him that pursuant to a meeting dated 28 November 2013 and after deliberating on the charge and his written explanation, the respondent was found guilty and punished with dismissal.

[18] Thereafter, the respondent requested through his solicitors for all the notes of proceedings and relevant documents pertaining to the decision that was informed to him by way of the letter on 2 December 2013. However, vide its letter dated 27 January 2014, the first appellant only informed him of the positions of the persons who sat in the meeting but refused to disclose the documents relating to the disciplinary proceedings citing confidentiality.

[19] It was against this dismissal that the applicant filed the present application for judicial review. The High Court, holding the view that the dismissal was valid, dismissed the action. The respondent appealed and the Court of Appeal allowed the appeal. It set aside the decision of the High Court and granted the respondent an order in terms of prayers (1), (4) and (5) of his judicial review application.

[20] For completeness, we reproduce the prayers for relief sought by the respondent relevant to this appeal with some modification (with emphasis on the ones allowed by the Court of Appeal):

(1) *That the respondent be granted a certiorari to quash the decision of the 1st appellant made on 28 November 2013 which was communicated to him on 2 December 2013*;

(2) ...;

(3) ...;

(4) *An Order for damages and that damages be assessed by a Deputy Registrar*;

(5) *Costs in the cause;* and

(6) Such further and/or other relief that the Court deems just and reasonable.

THE DECISION OF THE HIGH COURT

[21] The learned judicial commissioner, upon considering the merits of the judicial review application decided that the respondent's dismissal was lawful. The High Court did however, consider the feasibility of granting the respondent the remedy of reinstatement (specific performance of a personal contract). In denying him that relief (which was obiter considering the dismissal was upheld as being lawful), the High Court noted that reinstatement was not amenable to the respondent based on s 20(1)(b) of the Specific Relief Act 1950 ('the SRA 1950') and the decision of this court in *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135 ('Jempol').

[22] We now turn to the decision of the Court of Appeal which dealt specifically with the issue of whether the court can order specific performance of a contract of service, amongst others.

THE DECISION OF THE COURT OF APPEAL

[23] The Court of Appeal decided the appeal before it principally on three grounds:

(i) whether there was a requirement to appoint a Committee of Investigation pursuant to reg 29(4) of the 1995 Regulations to investigate the charge against the applicant?

(ii) whether the decision-making process was tainted with bias; and

(iii) whether the court can order specific performance of a contract of service?

Issue (i) — The requirement to appoint a Committee of Investigation

[24] The Court of Appeal noted that the 1995 Regulations are modelled after and modified based on the Public Service (Discipline and Conduct) Regulations 1993 ('1993 Regulations'). The relevant procedures applicable were in pari materia. The Court of Appeal also noted that the case authorities interpreting art 135(2) of the Federal Constitution in relation to the 'right to be heard' were also analogously applicable to s 16(4) of the LGA 1976 which confers employees of local governments the statutory right to a reasonable opportunity of being heard prior to dismissal or reduction in rank much like art 135(2) of the Federal Constitution does to members of the public services.

[25] Section 16(4) of the LGA 1976 reads as follows:

> (4) The Commissioner of the City of Kuala Lumpur in the case of the Federal Territory, or the Mayor or President or his representative who shall be a Councillor, the Secretary and one other Councillor in the case of other local authorities, may appoint such persons to the offices shown on the list so approved and may reduce in rank or dismiss such persons from office and may appoint others in their stead:
>
> Provided that the reduction in rank or dismissal from office of any Head of Department or his Deputy shall not take effect until such reduction in rank or dismissal has been confirmed by the State Authority:
>
> *Provided further that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.* (Emphasis added.)

[26] Citing a line of settled authority including that of *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203; [1976] 1 LNS 81 ('Najar Singh'), the Court of Appeal decided that the right to be heard need not necessarily mean that the subject need always be given the right to an oral hearing. So long as he has been heard, even by way of a written representation, then it can be said that the right to be heard has been afforded. Further, the Court of Appeal referred to reg 29(4) of the 1995 Regulations which it found to be in pari materia with reg 37(5) of the 1993 Regulations which stipulates that the disciplinary authority may set up an Investigation Committee if 'the Disciplinary Authority is of the opinion' that the case against the officer requires further clarification. The Court of Appeal therefore ruled that there was no requirement for the first appellant to afford the respondent an oral hearing.

[27] In similar vein, the Court of Appeal rejected the respondent's argument that he was denied the right to be heard simply by the fact that his request for an Investigation Committee to be set up was not granted.

[28] It should be noted that parties are not appealing against the Court of Appeal's finding on this issue.

Issue (ii) — Whether the appellants' decision-making process was tainted by bias or procedural impropriety

[29] The respondent here argued that the 28 November 2013 meeting's decision communicated to him on 2 December 2013 was tainted with bias or with procedural impropriety. This was on the ground that the first appellant had considered a report detrimental to the respondent without giving the respondent an opportunity to comment on and controvert the same. The respondent's grievance here was that the report submitted to the first appellant, without the respondent's knowledge, detailed the respondent's first

misconduct ie when he was found guilty of turning up late for work with the effect that he received a reduction in rank and a deferment of his salary increments for a period of 12 months.

[30] The Court of Appeal, upon examining settled authorities foremost of which include the decisions of the Privy Council in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 ('Surinder') and of the Supreme Court in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 ('Shamsiah'), held that dismissing someone without giving them the opportunity to explain or controvert material would violate the principles of natural justice and thus constitute procedural impropriety. The Court of Appeal quoted a passage by Lord Denning from *Surinder* at pp 172–173:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v Rice* [1911] AC 179, 182; 27 TLR 378 down to the decision of their *Lordships' Board in Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC). *It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other*. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. *No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing*. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 *and Goold v Evans* [1951] 2 TLR 1189 *to which might be added Rex v Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445 and many others. (Emphasis added.)

[31] Premised on the above, this is what the Court of Appeal held in its grounds of judgment at paras 52–53:

> Turning now to the case at hand, it is not disputed that the applicant's previous misconduct was within the knowledge of the first respondent and from the record before us, the first respondent did not provide such information to the applicant. Neither was the applicant informed that such information may be used against him in meting out the punishment.
>
> Based on the above we were of the view that the process undertaken by the first respondent had infringed the rule of natural justice and/or was tainted with procedural impropriety. Hence, it is our finding that the learned JC had failed to properly evaluate the evidence before him and/or appreciate the relevant laws applicable to the factual matrix of this case in making his ruling against the applicant on this point.

Issue (iii) — Whether the relief of specific performance is available to the respondent

[32] The Court of Appeal was not persuaded by what the learned judicial commissioner held on this subject. For clarity, this is what the learned judicial commissioner held at paras 168 and 170–172 of his grounds:

> The Court will not order the specific performance of contract of service which existed between the Applicant and the Second Respondent or grant declaratory relief which effectively grants specific performance on a claim of wrongful dismissal. Therefore a claim for reinstatement available to a permitted claimant in an Industrial Court or to a holder of a public office as categorized under Article 132 and 135(2) of the Federal Constitution is not available to the Applicant. He is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service. As the Applicant cannot resort to the provisions of the Industrial Relations Act 1967, he accordingly cannot not claim the declarations that his dismissal was void and it is not possible for him to obtain reinstatement. Whichever manner the Applicant's declarations or prayers are couched, the inevitable result of declaring that his dismissal is void will result in reinstatement which is not permitted.
>
> In *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1, the Court of Appeal held inter alia, that to create another possible exception in addition to the two (2) decided in Mohd Ahmad (supra) there must exist, in support of the employees employment, a statute of a similar nature and effect as that available in *Malloch v Aberdeen Corporation*. The Court found no legislation even close to the legislation before the House of Lords in *Malloch* (supra), in support of the Respondent's employment to elevate him to the position where he could ask for declaration that his termination was null and void and that he be reinstated.
>
> Further, pursuant to Section 20(1)(b) of Specific Relief Act (SRA) 1950, an employee who has been wrongfully dismissed cannot seek specific performance of his contract of employment. Section 20(1)(b) of SRA 1950 is consistent with the common law position that as a contract of employment is a contract dependent on the volition of the parties, it cannot, in the absence of special circumstances, be specifically enforced either by a declaration that the contract still subsists or that the dismissal is invalid/void.

[33] The Court of Appeal in disagreeing with the High Court's finding held as follows at paras 60–62, and 64–65 of its grounds.

> From the judgment of the learned JC, we found that the learned JC was more persuaded by the argument of the respondents that the relief in the form of specific performance and/or the like effect could not be ordered. The learned JC relied on the two exceptions enunciated in the case of Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor, in that, firstly, cases involving industrial relations where an employee was claiming for reinstatement on ground of dismissal without just cause or excuse or under s 20 of the Industrial Relation Act 1967 or secondly in cases involving a public officer as set out under art 135(2) of the

FC. The learned JC, was being guided by the above two cases where the Federal Court and the Court of Appeal respectively had ruled that as a matter of principle the court will not order specific performance unless the case falls under the two exceptions stated above. The learned JC further ruled that as the employees of the second respondent, being an employee of a local authority he is employed purely on a contractual basis and he is not a public officer envisaged by art 132 of the FC. At most he could only claim damages if he could establish that his dismissal was in breach of the contract of service.

We are of the view that the learned JC has erred in adopting the above-mentioned cases without fully appreciating the law and the procedures involved in these cases. The learned JC had failed to consider, in the case at hand there is a specific provision in the LGA which provides the guarantee of a reasonable opportunity of being heard to be accorded to the applicant facing disciplinary proceedings with a view to reduction in rank and/or dismissal. The guarantee is further entrenched by way of a legislation in the form of MPSP Disciplinary Regulations which provide the procedures to be complied with in the event the first respondent proposes to take disciplinary action against the applicant with a view to dismissal or reduction in rank. The statutory requirements stipulated in the LGA and the procedures outlined in the MPSP Disciplinary Regulations were not available to the officers and/or employees in the two cases relied by the respondent and further endorsed by the learned JC. Hence these cases ought to be distinguished.

By codifying the provision for a reasonable opportunity to be given to the applicant for cases involving reduction in rank and/or dismissal, something equivalent to art 135(2) of the FC and legislating of the MPSP Disciplinary Regulations, the respondent had brought themselves into the realm of public law domain. Hence, there is a special guarantee given to the officers and/or employees of the second respondent. The relationship is no longer a plain master and servant relationship as envisaged in the two cases cited by the respondents and relied by the learned JC.

...

In the case involving the applicant, the relationship is not merely a master servant relationship but the employment was supported by the LGA and the MPSP Disciplinary Regulations. *Hence, the protection accorded to the officer of a local authority is special, because in an ordinary contract of employment or personal service, the employee need not necessarily be given the opportunity of being heard before a decision is made to reduce him in rank or to dismiss him from the employment. This relationship has changed from a pure master and servant relationship to a relationship which attract public law remedy*. Like the public officers, the applicant herein enjoys certain protection by the law through s 16(4) of the LGA and the MPSP Disciplinary Regulations. *The protection given to the applicant is special as in the normal contract of service and/or employment or personal service, the employee need not be given a reasonable opportunity of being heard in cases of reduction in rank or dismissal.*

We were of the view that the case at hand raised public law issues as it is a decision and action taken by the first respondent in pursuance of the provision of an act of Parliament, the LGA that is being impugned. As such a decision taken by the first respondent with regard to the applicant as an officer of the second respondent in his duties is one which has

A *implications for the public as a whole and in consequence of this that the public law is concerned with the decision-making process. The legal sources of the powers that are being impugned are in the public domain*. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case, the second respondent and in the circumstances of the
B case at hand, the protection of the law that it is entitled to by the process available under O 53. (Emphasis added.)

[34] Based on what was held above, the appellants argue that the Court of Appeal erred because it effectively created a 'third exception' to the two
C exceptions already adumbrated in *Jempol*.

[35] The respondent however, maintains that the Court of Appeal was correct. In essence, the respondent makes the case that his employment has a 'public law' element to it. In this sense, it is argued, that the relationship
D between the second appellant and the respondent is not purely one of master and servant. Because it has a public law element to it, it remains open to the respondent to seek public law remedies to wit, a writ of certiorari.

E OUR DECISION

The merits — The Court of Appeal's decision on the legality of the respondent's dismissal

F The respondent's preliminary objection against the appellants' notice of appeal dated 5 April 2018 vis a vis the sealed order granting leave to appeal dated 26 March 2018

[36] It bears repeating here that the High Court found that the respondent's
G dismissal was lawful. On appeal, the Court of Appeal found, that there was indeed procedural impropriety when it came to the said dismissal. It accordingly reversed the High Court and held that the appellants' act of dismissing the respondent was tainted with procedural impropriety.

H **[37]** We agree that upon reading the sealed copy of the notice of motion for leave to appeal to this court dated 8 November 2017 together with the sealed order granting leave to appeal dated 26 March 2018, none of the questions as posed by the appellants on that issue were allowed. Instead, the sole leave question we have before us appears to be a fusion of the tenth and eleventh
I leave question. The resulting leave question is specific to the question relating to reinstatement in cases of this kind in specific reference to the decision of this court in *Jempol*.

[38] Despite there only being one leave question granted, the appellants nonetheless attempted to challenge the validity of the Court of Appeal's decision on the merits. This is apparent from item (i) of their notice of appeal dated 5 April 2018 which reads as follows (as translated into English):

> The above-named appellants appeal against the decision of the Court of Appeal which held as follows:
>
> (i) *That the process of making a decision tainted with bias on part of the Appellants by stating the Respondents conviction in relation to his prior misconduct [i.e. the First Misconduct] submitted by the first Appellant's Secretariat to the first Appellant in the Working Paper day before its determination on the Respondents charge without giving him the opportunity to controvert it*; and
>
> (ii) Relief in the form of Specific Performance may be availed of by the Respondent. (Emphasis added.)

[39] It is true that there is an exception to s 96 of the CJA 1964 whereby the Federal Court may *suo motu* pose additional questions necessary to deal with matters it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case. Parties too may generally themselves raise additional issues beyond the scope of the questions of law upon which leave was granted where circumstances justify it. See generally: the judgments of the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; and *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337.

[40] Counsel for the respondent drew our attention to the following passage from the judgment of Abdul Hamid Mohamad JCA (as he then was sitting in the Federal Court) in *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513 where at pp 542–543 His Lordship said as follows:

> The learned counsel for the respondents went on to argue that this court had no jurisdiction to grant leave as per the question posed and urged this panel to set aside the leave granted by the earlier panel or, alternatively, to decline to answer the question posed as it is academic. The learned counsel for the respondents submitted that the question posed did not arise from the judgment of the Court of Appeal in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction. He referred to s 96(a) of the CJA, the cases of *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1, *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65, *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 and *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra Bhd* [2002] 1 MLJ 385.
>
> *Generally speaking, it should not. The issue has been decided by this court. It is res judicata. A party should not be given a second bite of the cherry. A new panel of this court*

A *should not be reversing the decision of the earlier panel of the same court. There should be consistency in the judgment of the court.*

However, where the granting of the leave is challenged on the ground of lack of jurisdiction, this court has held that the granting of the leave to appeal to this court may still be challenged even at the hearing of the appeal. (Emphasis added.)

B

[41] To our minds, there is no jurisdictional issue here. The High Court decided that the dismissal was valid. The Court of Appeal reversed the decision. Leave to appeal on the questions relating to his dismissal were not granted save and except on the question relating to specific performance or reinstatement. Allowing the appellants to ventilate issues which were expressly disallowed at the leave stage, would effectively be reversing the decision of the leave panel herein when they expressly, and we think correctly, decided that the remaining leave questions did not meet the threshold for leave under any of the limbs of s 96 of the CJA 1964. Thus, we see merit in the respondent's preliminary objection that we ought not to deliberate on the decision of the Court of Appeal on the merits and we are therefore inclined not to interfere with its finding on this point.

E The decision of the Court of Appeal on the merits re procedural impropriety

[42] Having held that we will not delve into the correctness of the merits relating to the legality of the dismissal, we nevertheless consider that a brief comment on this issue would be pertinent.

F

[43] On this issue, this is what the Court of Appeal held:

Turning now to the case at hand, it is not disputed that the applicant's previous misconduct was within the knowledge of the first respondent and from the record before us, the first respondent did not provide such information to the applicant. Neither was the applicant informed that such information may be used against him in meting out the punishment.

G

Based on the above we were of the view that the process undertaken by the first respondent had infringed the rule of natural justice and/or was tainted with procedural impropriety. Hence, it is our finding that the learned JC had failed to properly evaluate the evidence before him and/or appreciate the relevant laws applicable to the factual matrix of this case in making his ruling against the applicant on this point. (Emphasis added.)

H

I **[44]** The Court of Appeal arrived at the above conclusion by referring to, among others, the decision of Privy Council in *Surinder* at para 45. The Court of Appeal also referred to the judgment of the Supreme Court in *Shamsiah*. In our view, administrative law on the subject of dismissal of public employees is settled. We accordingly find no reason to depart from these authorities.

[45] As leave was not granted on the aforesaid questions of law relating to the merits, and as we are in any event wholly satisfied that the Court of Appeal arrived at the right conclusion on the correct application of the law, we find there is no basis for our interference with the same.

[46] In the result, we are minded to affirm the decision of the Court of Appeal to the extent it held that the appellants' act of dismissing the respondent was tainted with procedural impropriety.

The leave question — Whether specific performance is possible?

[47] That said, we are only left to consider whether the Court of Appeal's decision to issue a writ of certiorari in terms of prayer (1) of the respondents application for judicial review was correct in law.

[48] The appellants argue, based on this court's decision in *Jempol*, that specific performance may not be granted as between master and servant. To this effect, they argue that that case had decided that there are only two recognisable exceptions ie: (i) cases which fall under s 20 of the Industrial Relations Act 1967 ('the IRA 1967'); and (ii) in respect of public servants as recognised under art 135(2) of the Federal Constitution.

[49] In response, the respondent takes the position that this is a case involving public law remedies. We summarise the respondent's submission as contained in paras 23–26 of its written submission dated 5 September 2018:

> The Regulations of the second Appellant are made pursuant to the Local Government Act 1976, thus there is a public law element to that decision which makes it suitable and appropriate to be judicially reviewed. This contention finds support in this Court's decision in the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 [quotation ommitted] ...
>
> As in the *Ahmad Jefri* case, the Respondent in the facts before this Honourable Court was dismissed pursuant to the powers granted to the Appellant by virtue of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 which Regulations are in turn made by the powers conferred under s 17, Local Government Act 1976.
>
> In light of the above, it is submitted that the law is settled in situations where an employee is dismissed by a body which had acted within the scope of statutory power and although the decision may be a private law matter but the fact that there were statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal underpinned the public law element in that situation. In such situations, the decision to dismiss can be reviewed by the Court by way of a Judicial Review Application.
>
> It is therefore humbly submitted that the Court of Appeal had rightly applied the

A above quoted cases of this Court in arriving at its decision that the Respondent *is entitled to his prayer for certiorari against the decision to dismiss him*. (Emphasis added.)

B *Jempol* and the principles relating to specific performance in contracts involving personal service

[50] Equitable remedies like injunctions, and specific performance are generally granted on the basis of the discretion of the court. See for instance the judgment of the Federal Court in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 at p 582. However, in exercising their discretion in respect of the grant of specific performance, the courts are also subject to statutory conditions stipulated in the SRA 1950. Section 20(1)(b) thereof expressly stipulates that contracts relating to personal service are not specifically enforceable. The said section reads:

20 (1) The following contracts cannot be specifically enforced:

...

(b) a contract which runs into such minute or numerous details, *or which is so dependent on the personal qualifications or volition of the parties*, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms ... (Emphasis added.)

[51] We think Illustration (a) to the section is explicit enough to indicate the operation of the rule:

(a) A contracts to render personal service to B;

A contracts to employ B on personal service;

A, an author, contracts with B, a publisher, to complete a literary work;

B cannot enforce specific performance of these contracts.

[52] That the above rule applies to those in a master and servant relationship (employer-employee relationship) was encapsulated in the old English case of *Johnson v The Shrewsbury and Birmingham Railway Company* (1853) 43 ER 358 ('Johnson'). At pp 362–363, Knight Bruce LJ observed as follows.

Assuming, however, that there is nothing in the agreement contrary to public policy, *still I apprehend that there may be objections to the Court interfering by way of specific performance*. I may have made these observations rather out of place, but they do not seem to be immaterial. There is here an agreement, the effect of which is that the Plaintiffs are to be the confidential servants of the Defendants in most important particulars, in which, not only for the sake of the persons immediately concerned but for the sake of society at large, it is necessary that there should be the most entire harmony and spirit of co-operation between the contracting parties. How is this

possible to prevail in the position in which (I assume for the purpose of the argument by the default of the Defendants) the Defendants have placed themselves? *We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done* ...

It is clear in the present case that, *had the Defendants been minded to compel the Plaintiffs to perform their duties against their will, it could not have been done*. Mutuality therefore is out of the question, and, according to the rules generally supposed to exist in Courts of Equity, that might have been held sufficient to dispose of the matter ... (Emphasis added.)

[53] His Lordship, quoting himself from another case in which he decided on the same point of law, and that damages was the more appropriate remedy, went on to observe as follows at p 364:

To force upon him in such characters a person, however estimable, however professionally eminent, who is objectionable to him, or in whom he does not happen to confide, would, if legal, be surely hard; and, sitting in a Court of Equity, I do not feel any inclination to do it.

I then proceeded to observe on the point of mutuality, and gave my opinion against the Plaintiff. Now, apologising for reading so much as I have of the case, I have done so merely because the same observations are applicable here, and are such as in substance I should have made here, if I had not found them made previously. *For the reasons that I have stated, assuming that every disputed fact is as the Plaintiffs assert and not as the Defendants assert, I think this not a case in which the Court ought to interfere*. The inconvenience and mischief to the Defendants, to say nothing of the interest of society at large, would be greater if the Court should interfere than anything that could possibly happen to the Plaintiffs by declining to interfere, especially since, as in the case of *Pickering v The Bishop of Ely*, all that the Plaintiffs require (*and I use the expression not otherwise than respectfully towards them) is money, and if they are entitled to money, they will be able to recover it in the ordinary course of law*. (Emphasis added.)

[54] It is premised on the above that English Courts are averse to the idea that contracts of personal service may ever be specifically enforced by the fact that performance of such contracts calls into question the volition of parties. The basic principle is that courts cannot force parties to do that they do not wish to do under a contract. In lieu thereof, the courts award damages. What was then a rule of public policy has now received statutory affirmation in s 20(1)(b) of the SRA 1950. On that proposition there is no real dispute.

[55] This leads us to this court's decision in *Jempol*. The facts were these as can be gleaned from the head notes. The appellant was employed by the respondent local council as a market supervisor. The appellant's contract of service stated that his employment was subject, inter alia, to the General Orders

of the Government, including the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, otherwise known as General Orders Chapter D.

[56] In 1984, the appellant was absent from work for six consecutive days and was dismissed from his employment as a result. The appellant filed a suit against the respondent in which he sought for a declaration that his dismissal was void and of no effect, and further, for damages. The respondent applied to strike out the claim under O 18 r 19(1)(a), (b) and (d) Rules of the High Court 1980, and at the hearing thereof, raised a preliminary objection: (i) that the appellant, being an employee appointed under the Local Government Act 1967, was not entitled to ask for reinstatement; and (ii) that the appellant had no right to ask for the declaration aforesaid because, by that declaration, he was in fact asking for reinstatement.

[57] The High Court acceded to the respondent's contention and to the principle that courts will not normally enforce a contract of service between master and servant. It accordingly allowed the objection and consequently dismissed the appellant's claim. The appellant appealed, and argued before the appellate court that the incorporation of the General Orders Chapter D into his contract of service had made him a public officer in law, and not merely an employee or servant of the respondent, and as such, was entitled to the relief he was praying for.

[58] It was in this context that Peh Swee Chin FCJ held as follows at pp 142–143:

> Following the principle aforesaid, (hereafter the said principle), the logical result will be that a dismissed employee cannot claim any declaration that 'his dismissal was void' and if he wants to cast his pleading in the form of a declaration, then he can claim a declaration, eg, he was dismissed in breach of the contract of service and that he claims damages for such breach. To claim that his dismissal was void would indicate that he wants to have his job back. It is therefore understandable and it was quite natural for learned Counsel to apply under O 18 r 19 of the Rules of the High Court 1980 to strike out the statement of claim for such reinstatement, with the statement of claim claiming a declaration that 'he is still' market supervisor, with the clearest implication that his earlier dismissal is void or invalid.
>
> It appears to us that to the said principle, there are two exceptions.
>
> The first exception is a permitted claimant/employee before an Industrial Court, claiming reinstatement, arrears of wages etc. on ground of dismissal without just cause or excuse. Such a claimant can present his case after the Minister of Labour decides to refer his case to that Court when he thinks fit, see s 20 of the Industrial Relations Act 1967. *The said Act has, of course, statutorily and radically, changed the common law with regard to such permitted claimants/employees for the sake of promoting national economic interest, industrial peace and conferring upon ordinary*

workman benefits far beyond those that are available in the ordinary Court. Apart from the Industrial Relations Act 1967, there may be some other statutes which may modify the said principle, though not quite in a radical way like the said Act. It will be a matter of interpretation of the relevant provisions in such modifying statutes to find out in what precise ways the said principle has been modified.

The second exception is a holder of any public office of certain types. In Malaysia, fortunately for clarity or certainty, such public offices as spelt out or set out in art 132 of the Federal Constitution are as follows. They are public offices in the armed forces, the judicial and legal service; the general, public service of Malaysia, the police force; the joint Federal and State public services; the education service; and finally the public service of each State. *All holders of public offices abovementioned, except the public service of each State, hold office during the pleasure of the Yang di-Pertuan Agong and those who hold office in the public service of each State hold office, on the other hand, during the pleasure of the Ruler of the State as the case may be*.

Holders of the said public offices enjoy special protection through the Federal Constitution as conferred by its art 135 which provides that, no holder of such office, subject to legislation or subsidiary legislation enacted for carrying out such protection, shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard nor shall he be so dismissed or reduced in rank by any authority subordinate to that other authority which has power to appoint him. There are, of course, rules of disciplinary procedure provided for the purpose. (Emphasis added.)

[59] His Lordship, in declining to recognise a 'third exception' in relation to employees of local authorities had this to say at p 145:

In the instant case, the Supervisor has been or was undoubtedly an employee of a Local Council. It was the Local Council that sent the letter of offer dated 11 March 1983 offering to him the post in question on its own behalf. It has never been disputed this letter contained the terms and conditions of a contract of service which were unconditionally accepted by the Supervisor. Employees of local authorities are not holders of public offices holding office during the pleasure of the Yang Di- Pertuan Agong or the Ruler of any particular state as the case be as, they are not under any category under art 132 of the Federal Constitution except any employee in any local authority seconded from State Government or the Federal Government. In general, the employees of local authorities are employed purely on contract basis.

The Supreme Court in Quek Chek Yen v Majlis Daerah Kulai [1986] 2 MLJ 290, 292, quoted with approval, Halsbury's Laws of England 4th Edn, Vol 16 at p 369 about employees of local authorities:

> Officers of local authorities are appointed on such reasonable terms and conditions as the authority thinks fit. Employees of national corporations are not in the position of civil servants and do not hold office at the pleasure of the Crown.

[60] Based on the above passage, we turn our attention to the decision of the Supreme Court in *Quek Chek Yen v Majlis Daerah Kulai* [1986] 2 MLJ 290

('Quek'). The facts were shortly these. The appellant worked as the Secretary of the Kulai Local Council, Johore. His contract of service was terminated, he claimed, without the benefit of reasonable notice. The case was decided on the basis of the Local Councils Ordinance 1952 which has since been repealed with the passing of the LGA 1976. There was, in the Local Councils Ordinance 1952, no statutory right to be heard akin to s 16(4) of the LGA 1976. It was on that basis that Hashim Yeop Sani SCJ held that the dispute between the parties was determinable on the basis of ordinary contract law. Thus, we can safely conclude that, on the facts, the *Quek* case itself had nothing to do with the right of having a reasonable opportunity of being heard. With respect, we do not therefore see how the *Quek* decision is relevant to the determination of the exceptions to reinstatement in the present case.

[61] Before commenting on *Jempol*, we note as follows. Firstly, s 20(1) of the IRA 1967 indeed represents a departure from the common law rule that there cannot be specific enforcement of contracts of personal service. Subsection (1) of the said section reads as follows:

> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[62] That the IRA 1967 is a 'radical departure' from the common law is, to our minds, adequately reflected in the words of Haidar J (as he then was) in *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230 at p 236; [1992] 2 CLJ Rep 521 at p 526, where His Lordship said as follows:

> These grounds can be conveniently dealt with together. It is essentially on the issue of reinstatement. As stated by me earlier the respondent in her representations initially wanted reinstatement which is in accordance with s 20(1) of IRA but subsequently in the hearing before the Industrial Court she changed her stand and instead asked for damages in lieu of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? *In my view the respondent clearly could not come within the provisions of s 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have any more jurisdiction.* According to the case of Dr A Dutt:
>
> > the right to compensation must be an issue in representations for reinstatement and necessarily arises where the Court would not order reinstatement.
>
> In the case here the issue in representations for reinstatement no longer arises as the respondent clearly abandoned reinstatement in the course of the hearing before the Industrial Court. According to Chang Min Tat FJ in Dr A Dutt's case at p 304:

> *If a workman complains he has been dismissed without just cause or excuse*, it does mean that he is dissatisfied with his dismissal or termination of services and he wants his job back. However there may exist circumstances and reasons why reinstatement should not be ordered. (Emphasis added)

[63] The entire basis for the Industrial Court's jurisdiction is premised on a prayer for reinstatement. It is therefore apparent to us that the Legislature's enactment of s 20(1) of the IRA 1967 was for the express purpose of exempting the application of the statutory rule in s 20(1)(b) of the SRA 1950. The harmonious application of the two provisions is reconcilable via the Latin maxim: *generalia specialibus non derogant* — provisions of a general statute yield to those of specific ones. Outside the parameters of the IRA 1967 (or any other specific statute), the lay workman cannot avail himself of reinstatement in any other way.

[64] That the IRA 1967 was expressly intended to be a 'radical' departure from the public policy rule in s 20(1)(b) of the SRA 1950 may generally be gleaned from the Hansard of the Dewan Rakyat on the occasion of the second reading of the Industrial Relations Bill. See: Hansard, Dewan Rakyat (22 June 1967) per The Honourable Tuan Manickavasagam, at pp 1530–1532:

> The voluntary system of industrial relations which we have so long adopted in this country has worked with a reasonable degree of satisfaction ...
>
> During recent years, however, a number of factors or trends have been developing which necessitated a review of this system of industrial relations and to reinforce this system with additional mechanisms and safeguards for the more orderly and expeditious settlement of industrial disputes, especially where these affect the public and national interests.
>
> The accelerated pace of industrial expansion and the increasing growth of trade union organisations and activity have focussed attention on a number of issues governing employer-employee relations which have not been effectively provided for under the voluntary system of industrial relations ...
>
> The increasing insistence of the parties on their respective legal rights and prerogatives, even sometimes in the face of the fast changing colour of these rights and prerogatives, their unwillingness to use normally accepted procedures to resolve contentious issues and, sometimes their uncompromising attitude to issues in dispute, have shown up the inadequacy of our present system of industrial relations. The experience has been that where one party or the other is in a strategic position, by virtue of its organisational strength or market position, that party has depended on its own strength to press or pursue its particular stand, irrespective of the merits or the consequences of such action.
>
> These attitudes of the parties and their inability to resolve amicably many of the problems that arise between themselves have tended sharply to affect the convenience of the public and the security and economy of the nation.

A Even when the parties are aware of the effect of their action on the nation or the public or the economy of the country, it has not always been possible for amicable steps to be taken to settle the issues. It is because of such factors and trends that the Government has had, on occasions, to introduce specific measures to alleviate the situation.

B

[65] In light of what was held in *Jempol* the reinstatement mechanism in the law as they stand up to this point, appear to have been resolved by way of the statutory exception in s 20 of the IRA 1967.

C

[66] What is crucial to note about that section however, is that its application is excluded to those under the public employ. Section 20 finds its place under Part VI of the IRA relating to 'Representations on Dismissal'. The avenue of reinstatement is therefore not available to any workman 'employed by the Government or any *statutory authority*'. This is by virtue of s 52 of the same which reads as follows:

D

52 *Application*

(1) Parts II, III, IV, V and *VI* shall not apply to any *Government service or to any service of any statutory authority or to any workman employed by Government or by any statutory authority*. (Emphasis added.)

E

[67] For completeness, the following definitions under s 2 of the IRA 1967 are also relevant:

F 'employer' means any person or body of persons, whether corporate or unincorporate, who employs a workman under a contract of employment, and includes the Government and any statutory authority, unless otherwise expressly stated in this Act;

'government' means the Federal Government or the Government of a State;

G

'statutory authority' means an authority or body established, appointed or constituted by any written law, and includes any local authority;

'workman' means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of

H any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

[68] 'Employer' includes the government and any local authority, and

I 'workman' includes any person employed by an 'employer', by virtue of s 2 of the IRA 1967. But it is apparent that members of the public service as defined in art 132 of the Federal Constitution as well as any person under the employ of a statutory body (including a local authority) cannot have recourse to the reinstatement provision under the scheme of the IRA 1967 because although

they fall under the definition of 'workman' by virtue of s 2 thereof, s 52 bars them from recourse to s 20(1) of the IRA 1967 and thus, the remedy of reinstatement.

[69] Given the above backdrop, the first exception elucidated by Peh Swee Chin FCJ in *Jempol* makes sense. What we find, with respect, more difficult to comprehend and to explain is the second exception. His Lordship indicated that the second exception applies by virtue of the special protection afforded to public officers as listed in art 132 of the Federal Constitution on the basis that they hold office at the pleasure of the Yang Di-Pertuan Agong. Taking this point, there still remains no statutory basis to overcome the exception to reinstatement in s 20(1)(b) of the SRA 1950.

[70] We think the apparent confusion in this context stems from the nature of the prerogative writ of certiorari. It is trite that the writ is a judicial remedy available in public law. When granted, the writ serves to quash any impugned administrative action. The net result is that, when granted, the writ nullifies the decision and renders that decision non-existent. There is therefore a stark difference between specific performance, on the one side; and the writ of certiorari on the other.

[71] A decree of specific performance is akin to an injunction because it operates to compel a party to the contract to perform the action he promised to perform under the contract — provided of course that the contract is in the first place specifically enforceable. That such a decree is akin to an injunction was also impliedly recognised by Knight Bruce LJ in *Johnson*, at p 364. The difference between a decree of specific performance and injunctions generally is that the former is contingent upon the prior existence of a valid contract capable of enforcement. An injunction generally be it prohibitory or mandatory — perpetual or interim — need not necessarily be contingent upon a contract. It is in this sense that when specific performance is sought in general terms, the equitable tests (foremost of which is the balance of convenience test) do not typically feature in such actions.

[72] Certiorari however, to our minds has no similar compulsive effect. As already stated, it only has the effect of nullifying an administrative decision. Once nullified, the natural result is that the decision is taken to have never existed. Now, in the context of public employment, where the termination of a public officer is unlawful, it remains open to the court to issue a writ of certiorari quashing the unlawful decision to dismiss the employee from any given public service. The net effect is as though the employee has been 'reinstated' into his employment.

A **[73]** But the issue of semantics here is important. In the case of ordinary contracts of employment, the statutory mechanism in the IRA 1967 operates to overcome the volition of the employer by compelling him to accept his employee by virtue of an order made by the Industrial Court. It is in this context that the word 'reinstatement' is appropriate. But in the case of a public B employee who has no recourse to the Industrial Court, the issuance of the certiorari would effectively place the dismissed public employee and the public employer in a position they were *status quo ante*. For the purposes of comprehending the concept, it is at best understood as conceptual 'reinstatement'. C

[74] Having stated the general but major differences between specific performance and writs of certiorari, we now turn our attention to the judgment in *Jempol*. With the greatest of respect, we note that the judgment suffers at least two infirmities. D

[75] Firstly, Peh Swee Chin FCJ commented that public officers defined in art 132 of the Federal Constitution may be reinstated. His Lordship indicated that this was special to them because of the fact that they hold office at the E pleasure of the Yang Di-Pertuan Agong. But, central to His Lordship's reasoning was the fact that he noted art 135(2) of the Federal Constitution specifically protects holders of public officers from dismissal without being given the reasonable opportunity of being heard. Practically speaking, His Lordship was correct in noting that the said public officers may also be F 'reinstated' like employees under ordinary contracts of employment. But, what was not brought to the Federal Court attention was that 'reinstatement' comes by way of a certiorari and not via a decree of specific performance. We note that the exact same right (as provided in art 135(2)) exists in s 16(4) of the LGA 1976 which section received neither comment nor attention from the Federal G Court in that case.

[76] It is important again, we think, to further understand the distinction. As we stated before, the decree of specific performance is contingent upon a contract. The basis for the Industrial Court to award it stems from its statutory H powers under s 20(1) of the IRA 1967. In the case of certiorari however, the supposed act of 'reinstatement' is derived not so much from the contract, but from the fact that the given public body breached either a constitutional or statutory provision.

I **[77]** To highlight the distinction, we find considerable support for the demarcation between the two in a judgment of the Indian Supreme Court in *Managing Director, Uttar Pradesh Warehousing Corporation and another v Vijay Narayan Vajpayee* 1980 2 SCC 459 ('Vijay'). The facts can be stated as summarised from the headnotes.

[78] The respondent was employed as a warehouseman by the Uttar Pradesh State Warehousing Corporation which is a statutory body constituted under the Uttar Pradesh State Warehousing Corporation Act 28 of 1956 later replaced by the Uttar Pradesh Act 58 of 1962. Complaints were made against the respondent alleging theft and misappropriation. He was asked to submit an explanation and provide evidence if any which would exculpate him from the allegations. In his explanation, he had requested to cross-examine certain witnesses and to examine certain others. Without addressing the respondent's request, the managing director of the corporation dismissed the respondent from employment.

[79] The respondent accordingly filed a petition claiming a writ of certiorari to quash the order of his dismissal on the grounds that it was in breach of his right to be heard afforded under one reg 16. The High Court found in his favour, issued the writ, directed reinstatement with full back wages. The Corporation, the appellants, then filed a writ petition under art 226 of the Indian Constitution at the Supreme Court against the decision of the High Court on the grounds that the said reg 16 had not yet come into force (and so he had no such right to be heard) and that in any event, the only remedy available to the respondent was damages.

[80] On the natural justice point, the Supreme Court held that the respondent was indeed entitled to the right to be heard notwithstanding the said reg 16 had yet come into force. The Supreme Court held that the employer was, a public body, and there was an express statutory right to be heard — the appellants were nonetheless required to afford the respondent his right to natural justice. More pertinent to our present discussion however is the observation made by the Supreme Court on the right to reinstatement.

[81] This is what Sarkaria J held at para 9:

> [T]his Court held that a declaration to enforce a contract of personal service will not normally be granted. It was noted that there are three exceptions to this rule:
>
> (i) appropriate cases of public servants who have been dismissed from service in contravention of Article 311;
>
> (ii) dismissed workers under industrial and labour law; and
>
> (iii) when a statutory body has acted in breach of mandatory obligation imposed by statute.

[82] We note that this distinction made by His Lordship is not too different from the one made by Peh Swee Chin FCJ in *Jempol*. In the *Vijay* case there was in issue reg 16 — an express regulation which required the right to be heard to be afforded to the respondent. As we noted above, it seemed to have escaped the

Federal Court's scrutiny that s 16(4) of the LGA 1976 similarly contains a statutory safeguard modelled after art 135(2) of the Federal Constitution. In this regard, there appear to be little or no distinction between public officers on the one side, and public servants generally including those who serve in local authorities.

[83] The proposition that cases relating to public employment involve certiorari and not a generic decree of specific performance was also the subject of implicit distinction by Sarkaria J in *Vijay*. In commenting on other Indian authorities on the subject, His Lordship said at paras 11 and 12 as follows:

> It was further made clear that an ordinary individual, in the case of master and servant contractual relationship, enforces a breach of contract, the remedy being damages because personal service is not capable of enforcement. *In the case of statutory bodies, however, there is no personal element whatsoever because of the impersonal character of the bodies. In their case, the element of public employment and service and the support of statute require observance of rules and regulations …*
>
> Mathew, J in his separate but concurring judgment, pointed out how the concept of State has undergone drastic changes in recent years. A State is an abstract entity and can act only through the instrumentality or agency of natural and juridical persons … For this reason, a policy of public administration through separate corporations, which would operate largely according to business principles and be separate accountable, was evolved. Such public corporations constituted under enactments, became a third arm of the government. *The employees of public corporations are not civil servants. Insofar as public corporations fulfil tasks on behalf of government, they are public authorities and, as such, subject to control by government. The public corporation being a creation of the State is subject to the constitutional limitations of the State itself.* (Emphasis added.)

[84] The supporting views of Chinanappa Reddy J in the same case are also relevant. At paras 22, His Lordship observed:

> I find it very hard indeed to discover any distinction on principle between a person directly under the employment of the government and a person under the employment of an agency or instrumentality of the government or a corporation, set up under a statute or incorporated but wholly owned by the government …
>
> In growing realisation of the importance of employment in the public sector, Parliament and the Legislatures of the States have declared persons in the *service of local authorities*, government companies and statutory corporations as public servants and, *extended to them by express enactment the protection usually extended to civil servants from suits and prosecution*. It is, therefore, but right that the independence and integrity of those employed in the public sector *should be secured as much as the independence and integrity of civil servants*. (Emphasis added.)

[85] Now we note that the Indian Supreme Court nonetheless uses the term 'reinstatement' in respect of those employed in the public sector. We beg to

differ with the Indian Supreme Court on the use of such terminology for the reasons already stated. For all intents and purposes, 'reinstatement' only occurs when there is direct compulsion from the Industrial Court requiring an employer to re-employ his dismissed employee. This is not the case with certiorari which seeks to nullify an unlawful dismissal by a public body. While the former finds itself in private law, the latter exists in the realm of public law.

[86] Our view is, we think, fortified by the decision of the House of Lords referenced both in *Vijay* and by the court below in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 ('Malloch'). That case concerned the dismissal of a teacher working with the Scottish education authority. He was dismissed in accordance with a resolution. One of the issues before their Lordship's House was whether the said teacher could be 'reinstated' into his former position. Two pronouncements respectively of Lords Wilberforce and Reid are of significance.

[87] Lord Wilberforce pertinently drew a distinction between what His Lordship called 'pure master and servant relationships' on the one side, and public employment on the other. At pp 1294–1295, His Lordship observed:

> The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of the common law of contract inter partes, so that principles of administrative law, including those of natural justice, have no part to play. *The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful; no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void*. I think there is validity in both of these arguments, but they, particularly the first, must be carefully used. It involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. *A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre*. A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied (see *Barber v Manchester Regional Hospital Board*, *Palmer v Inverness Hospitals Board*, *Vidyodaya University of Ceylon v Silva*, *Vine v National Dock Labour Board*, *Glynn v Keele University*).
>
> One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', *which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection*. If any of these elements exist, then, in my opinion,

whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void. (Emphasis added.)

[88] In the case of public employment, His Lordship then noted how the said teacher was entitled to the administrative law remedy of certiorari. His Lordship observed as follows at pp 1295–1296:

On the other hand, there are some cases where the distinction has been lost sight of, and where the mere allocation of the label — master and servant — has been thought decisive against an administrative law remedy. One such, which I refer to because it may be thought to have some relevance here, is *Vidyodaya University of Ceylon v Silva*, concerned with a university professor, who was dismissed without a hearing. He succeeded before the Supreme Court of Ceylon in obtaining an order for certiorari to quash the decision of the university, but that judgment was set aside by the Privy Council on the ground that the relation was that of master and servant to which the remedy of certiorari had no application. It would not be necessary or appropriate to disagree with the procedural or even the factual basis on which this decision rests; but I must confess that I could not follow it in this country insofar as it involves a denial of any remedy of administrative law to analogous employments. *Statutory provisions similar to those on which the employment tested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an office, to attract appropriate remedies of administrative law* ...

My noble and learned friend, Lord Reid, has traced the history of legislation in Scotland down to 1908. *In my opinion, this shows very clearly that concurrently with the change from an officer ad vitam aut culpam to an officer holding at pleasure, the legislature intended to preserve the status of the teacher as one holding a public office, only to be dismissed after due process, in 1882 described as due deliberation by a body of elected members.* (Emphasis added.)

[89] This leads us to consider what Lord Reid had to say, which in our view, puts the principle in the plainest way possible ie that granting a certiorari *cannot* be taken as meaning 'reinstatement'. At p 1284, His Lordship said:

If, then, the respondents were in breach of duty in denying the appellant a hearing, what is his remedy? It was argued that it would not be right to reduce the resolution of dismissal because that would involve the reinstatement of the appellant — in effect granting specific implement of his contract of employment which the law does not permit. *But that would not be the effect. There would be no reinstatement. The result would be to hold that the appellant's contract of employment had never been terminated and it would be open to the respondents at any time hereafter to dismiss him if they chose to do so and did so in a lawful manner. Unless they chose to do that the appellant's contract of employment would continue*. (Emphasis added.)

[90] For clarity, Lord Wilberforce arrived at the same conclusion as Lord

Reid when His Lordship said as follows at p 1297:

> There remains only the question of procedure and remedy. I am supported by the opinion of my noble and learned friend, Lord Reid, that reduction is an appropriate procedural remedy in such a case as this: it was granted in Palmer v Inverness Hospitals Board. I can see no public policy objection to reduction of the resolution for dismissal, *which has the effect of leaving the appellant as legally in his appointment with salary and pension consequences to date*. (Emphasis added.)

[91] The above passages therefore cement the point that the granting of the writ of certiorari (which their Lordship's styled as 'reduction') is not the same as reinstatement as the quashing of the decision would effectively mean that the employee was deemed to continue working at the place from where he was dismissed.

[92] In the local context, the clear demarcation between the two fields of law was made by this court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 ('Ahmad Jefri'). In that case, a government officer attached to the Ministry of Culture, Arts and Tourism, was dismissed from the public service on account of him absenteeism. He was accordingly dismissed and the fact of his dismissal was *gazetted*. He commenced a writ action against the Government of Malaysia alleging that his dismissal was unlawful and that he was accordingly entitled to damages. The writ was struck out by the High Court on the grounds that he commenced his action using the wrong mode. It was said that he ought to have initiated his action by way of judicial review per O 53 of the Rules of Court 2012. The Court of Appeal agreed with the High Court and similarly dismissed his appeal.

[93] The public officer in that case then appealed to the Federal Court principally on the question whether he could only commence his action by way of judicial review. It was here that this court drew a crucial distinction between private law and public law — especially in the context of the remedies available in the latter class of cases. The pronouncement in that case fits squarely with our view and with the views expressed by the Indian Supreme Court in *Vijay*.

[94] Now the appellants place reliance on a judgment of our Court of Appeal in *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1 ('Perwira') in further support of the proposition that 'reinstatement' is not possible beyond the two exceptions in *Jempol*. The facts of that case were shortly these. The respondent in that case was found guilty of misconduct (the exact nature of which was not stated in the judgment). He argued that he was denied the opportunity of being heard and accordingly sought a declaration that the termination of his employment was null and void and of no effect. The Court of Appeal effectively took this to

mean a prayer for 'reinstatement'. At first instance, the High Court granted him that declaration effectively rendering him 'reinstated'.

[95] The statute relevant to that case was the Tabung Angkatan Tentera Act 1973 ('Act 101'). The Court of Appeal noted that there was no express indication in Act 101 affording the respondent a right to be heard. In effectively attempting to create a 'third exception' to *Jempol* in favour of 'reinstatement', the respondent placed reliance on *Malloch*. This is what Ahmad Maarop JCA (as he then was) held at paras 13–14:

> This brings us to the third exception (in addition to the two explained in Mohd. Ahmad) which, according to learned counsel of the respondent emanated from Malloch ...
>
> The unmistakable effect of the relevant legislation in Malloch was that no resolution for dismissal of a certificated teacher shall be valid unless the three preconditions provided thereunder were fulfilled. *So, clearly in Malloch, the appellant was supported (and we venture to say strongly) by legislation emanating from as early as 1882 entrenching the right of a teacher like the appellant to be dismissed only after due process*. Hence, the inevitable implication that the right to be heard should not be denied. *In our view therefore, to create another possible exception in addition to the two decided in Mohd. Ahmad, there must exist, in support of an employee's employment, a statute of similar nature and effect as that available in Malloch. In the instant appeal we find no legislation even close to the legislation before the House of Lords in Malloch, in support of the respondent's employment to elevate him to the position where he could ask for a declaration that his termination was null and void and that he be reinstated*. The truth is that the facts in Malloch and the instant appeal are poles apart. (Emphasis added.)

[96] The Court of Appeal then went on to scrutinise the provisions of Act 101 and found that there was no *Malloch* — like provision expressly conferring the respondent therein the right to be heard. In the result, the Court of Appeal allowed the appeal and set aside the declaration granted by the High Court on the basis that the relationship between the appellants and the respondent in that case was purely one of master and servant. Contrasting *Perwira* to the present appeal, s 16(4) of the LGA 1976 plainly grants the respondent the right to a reasonable opportunity to be heard and in that sense, brings it squarely within the perimeters of *Malloch*.

[97] The *Perwira* judgment also brings to the forefront the notion that just because the employer is a public body does not mean its employees have the right to be 'reinstated', so to speak. At para 87 of this judgment, we cited Lord Wilberforce who made this distinction by reference to the decision of the Privy Council in *Vidyodaya University of Ceylon and Others v Silva* [1964] 3 All ER 865 ('Vidyodaya').

[98] That case concerned the dismissal of a professor from the Vidyodaya University which was established by and the dismissal effected under the terms of a certain statute. The Privy Council held that just because the said university was established under the auspices of a statute did not mean that a writ of certiorari will be granted. There must be something more than that. Like in the case of *Perwira*, the Privy Council held that it is only on the basis where the dismissal is based on a statute does it acquire a public law element bringing it out of the ordinary master and servant relationship. In the words of Lord Morris (delivering the board's unanimous decision) at pp 874–875:

> In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and, if the contract is terminated, there are ordinarily no questions affecting status or involving property rights. It becomes necessary, therefore, to consider whether in the present case there are any features which suggest a relationship other than that of master and servant. It was submitted on behalf of the respondent first that, if someone has the power to determine what the rights of an individual are to be, then a duty to act judicially arises simply from the nature of the power, and secondly, that where the power is a power to dismiss from an office (and it was contended that the respondent could be said to be the holder of an office) and to dismiss not at discretion but by reason of misconduct, then there is a duty to act judicially. In their lordships' opinion the first of these submissions is too wide and cannot be accepted. The second calls for an examination of the position which the respondent occupied, having regard to the facts concerning his appointment and having regard to the provisions of the Act of 1958. It was contended that the respondent had certain statutory rights and that certiorari could be granted in order to enforce them and in order to ensure obedience to the provisions of the Act ...
>
> The circumstances in the present case differ from those which existed in the cases of *Suriyawansa v Local Government Service Commission* and *Abeyagunasekera v Local Government Service Commission* and their lordships do not find it necessary to discuss those cases; *there were rules which laid down the manner in which charges against someone in the service of the commission were to be examined* ...
>
> He invoked a procedure which is not available where a master summarily terminates a servant's employment, and for the reasons which have been expressed their lordships do not consider that the respondent was shown to be in any special position or to be other than a servant. (Emphasis added.)

[99] Thus, at the risk of repetition, a case of dismissal involving public employees especially where the procedure for dismissal is regulated by statute, is governed by public law and therefore amenable to public law remedies. This is unlike the case with ordinary employment contracts which fall within the scope of contract and labour laws. To further highlight this point, we find support in the dictum of James Foong FCJ in *Ahmad Jefri* where His Lordship held at para 36, as follows:

> Thus, the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power. *Though this decision*

involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is a private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpins the public law element in this case. This is not a case of a public authority being delegated with authority to hire and fire much like what has occurred in R v East Berkshire Health Authority, ex parte Walsh and Wendal Swann v Attorney General of the Turks and Caicos Islands. Here, a special statutory provision bearing directly upon the right of a public authority to dismiss the appellant. *This injects the element of public law necessary in this context to attract the remedies of administrative law making this case amenable for judicial review*. (Emphasis added.)

[100] As far as we are concerned, there is no practical distinction between those in the employ of the public services in art 132 of the Federal Constitution and those employed in statutory authorities where there is an express guarantee of the right to be heard protected by statute — much like the one guaranteed to the respondent in s 16(4) of the LGA 1976.

[101] It therefore bears clarification that when this court said in *Jempol* that there are two exceptions to the rule against reinstatement as far as specific performance is concerned — that does not, with the greatest of respect, reflect the position in law. This is because even in the case of an employee of local government such as the respondent, s 16(4) of the LGA 1976 expressly provides for a right to be heard. A contravention of that right potentially renders the termination void. In *Jempol*, the Federal Court was not referred to s 16(4) of the LGA 1976 as a consequence of which, the relief of certiorari was not even conceptually available to the employee. There was, with respect, a misapprehension of the concept of 'reinstatement' as far as a pure master and servant relationship is concerned on the one side, and employment the terms of which are governed by statute, on the other.

[102] The lack of availability of specific performance as a remedy relates primarily to the common law relationship of master and servant, which only provides for termination simpliciter. The only remedy available under termination simpliciter is that of damages, and any form of relief which is equivalent to specific performance is precluded — whether framed in the form of a declaration or 'reinstatement'. Here, we reiterate the sentiments expressed by Lord Wilberforce in the case of *Malloch* as set out in para 87 of this judgment. Based on the foregoing, we find ourselves constrained to depart from the decision in *Jempol*. In any event, we are of the view that what Justice Peh Swee Chin's observations were purely obiter based on the factual matrix of the case.

[103] Turning now to the leave question, as we have held that the second exception was articulated on a misapprehension of the law, the question 'whether the principle in *Jempol* applies in all cases or whether there are

exceptions to the general rule' is therefore academic. *In the result, we consider it unnecessary to answer the leave question.*

[104] Finally, it follows the Court of Appeal's decision in the present case (quoted in extenso at para 33 of this judgment) was, in law, correct. The court rightly noted that the relationship between the appellants and respondent herein is one governed by statute — and thus — one governed by public law and amenable to the whole range of remedies available thereunder. The Court of Appeal's finding that the parties' relationship is not simply one of master and servant was, based on the aforementioned authorities, also correct.

Moulding the relief in the present case

[105] The effect of the grant of certiorari in the present case is to place the respondent in his position immediately prior to the unlawful termination. The question that arises for consideration is whether having granted certiorari to quash the unlawful termination, is it open to the court to grant damages by way of an entire remedy, rather than placing the employee in his original position?

[106] The moulding of public law remedies subsists in Malaysia in the form of para 1 of the Schedule of the CJA 1964. This has been well-recognised in the judgment of this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 ('*Rama Chandran*') where at p 197, Edgar Joseph Jr FCJ observed:

> Having regard to the breadth of the provisions of para 1 of the Schedule to the Courts of Judicature Act 1964, it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions ...
>
> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.

[107] The views above stated above also received concurrence from Eusoff Chin CJ in His Lordship's separate judgment at p 183 expressing similar sentiments on the power of the courts to mould relief.

[108] On the point of moulding relief, certain Indian authorities support the proposition that it is not in all cases that an employee unlawfully dismissed is entitled to continue working at the place from where he was dismissed. Whether he continues working or not depends entirely on the facts of the case.

In this regard, the judgments of the Indian Supreme Court in *Vijay* and *Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha* 1980 AIR 1896; [1980] 2 SCC 593 ('Gujarat Steel') are relevant. In the latter case, the court granted damages rather than placing the workman back in their original positions (per Krishna Iyer and Desai JJ at paras 148–149 and 154–156).

[109] In the present case, we find that there was, with respect, a lack of judicial appreciation on part of the Court of Appeal of the evidence as to whether the respondent ought to be effectively 'reinstated'. As the appellate court, it is therefore incumbent on us, under these circumstances to intervene and to reconsider the facts of the case to determine the appropriate direction. We uphold the Court of Appeal's order in terms of prayer (1), but in clarifying the ultimate direction, it is our view, on the facts of this case, that an effective 'reinstatement' is not here warranted. We say this premised on the following facts:

(a) the respondent was at the initial stages of his employment with the second appellant dissatisfied with the fact of his transfer. This is reflected in para 14 of his affidavit in support of his judicial review application dated 6 February 2014;

(b) the respondent was also eventually found guilty of this first misconduct;

(c) as a result of both the aforementioned events, the respondent has brought at least two legal suits against the appellants;

(d) thereafter, the appellants took issue again with the respondent on the basis that he breached reg 4(2)(h) of the 1995 Regulations. In the result, the parties have been in constant litigation comprising in total at least three suits; and

(e) further, as part of the issues surrounding his unlawful dismissal, the respondent claims that certain members of the first appellant were 'biased' or in a position of 'conflict of interest' when they decided to dismiss him.

Damages

[110] Now, in respect of damages, the appellants, in their written submissions made only two short arguments. Firstly, they claim that the respondent is not entitled to damages on a 'there is no pay for no work' basis. Secondly, they claim the Court of Appeal did not specify the principles or method to determine the damages that can be awarded to the respondent.

[111] On the first point, the appellants have not cited to us any authorities, neither are we aware of any in Malaysia where the principle of 'there is no pay for no work' has been applied by our courts. In fact, the cases above-cited

suggest the exact opposite proposition. We find it difficult to fathom how someone like the respondent ought to be denied compensation on the basis that he did not work when it was the appellants themselves who unlawfully dismissed him in the first place.

[112] On the second contention, reading prayer (4) in its clear and ordinary language, it asks for an order for damages and that *damages be assessed before a Deputy Registrar*. So, it is plain why the Court of Appeal did not delve into the issue because the measure of damages here is matter for assessment proceedings.

[113] It should be noted that *Rama Chandran* was an exceptional case in that the Federal Court itself declined to remit the matter to the Industrial Court and determined the quantum of damages itself. As apparent in the judgment of Edgar Joseph Jr FCJ, the Federal Court was a capable of making the assessment of quantum itself. This is because the evidence to that effect was available before the court and the *Rama Chandran* case had itself been dragged on for far too long. See p 231 of Edgar Joseph Jr's judgment in *Rama Chandran*.

[114] In this case however, we would not venture to pursue the assessment ourselves as we do not have the same benefit this court did in *Rama Chandran*. In any event, we fail to see how this case is so 'exceptional' such that either the Court of Appeal or we ought to make the assessment on quantum on our own accord. We do however tend to think that this case has been in the courts for a considerable amount of time. Thus, on the basis of expediency, we are minded to modify prayer (4) to the extent that the assessment proceedings be heard before a judge of the High Court and not before a deputy registrar.

CONCLUSION

[115] Based on the foregoing, we dismiss this appeal with costs. That said, we are however minded to modify the order of the Court of Appeal as follows:

(a) prayer (1) in terms of the respondent's application for judicial review is allowed; in that, we uphold the grant of the writ of certiorari quashing the decision of the first appellant to dismiss the respondent on 28 November 2013 and communicated to him on 2 December 2013. *However, we make a further direction that the effect of our decision to quash shall only render the respondent in the employment of the second appellant from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of this judgment*; and

(b) we also, uphold the order of the Court of Appeal granted in terms of prayer (4) ordering that the respondent be awarded damages to be

assessed. However, because this appeal is as a result of protracted litigation we order that the assessment proceedings be heard by a judge of the High Court and not a deputy registrar. *We accordingly remit this matter to the High Court of Penang for assessment and further order that the matter be fixed for case management forthwith*.

[116] As for the leave question, considering our departure from *Jempol*, it has become academic. Cases such as this where the dismissal is regulated by statute affording a right to be heard elevates the status of the parties beyond a pure master and servant relationship. There is therefore no question of specific performance and a fortiori, it cannot be taken to mean 'reinstatement'. In the result, there is no issue of there being any 'third' or 'other' exception(s). To reiterate, in the circumstances, we consider it unnecessary to answer the leave question.

Order accordingly.

Reported by Ashok Kumar